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IN THE

Supreme Court of the United States

MAGNOLIA INDUSTRIAL FABRICATORS, INC.
and ST. PAUL SURPLUS LINES,

Petitioners,

—v.—

DEVON LOUISIANA CORP. and PETRA CONSULTINGS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONER

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The Maritime Law Association of the United States (hereinafter, "MLA") respectfully submits the following *amicus curiae* brief in support of the petition of Magnolia Industrial Fabricators, Inc. and St. Paul Surplus Lines (collectively "Magnolia") for a writ of certiorari.[1]

INTEREST OF *AMICUS CURIAE*

The MLA is a voluntary, nation-wide bar association founded in 1899, with a membership of approximately 3,100 attorneys, judges, law professors, and other distinguished members of the maritime community. Its attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests—shipowners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.[2] This Court has

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Pursuant to this Court's Rule 37.2(a), *amicus curiae* states that petitioner and respondent received timely notice of the intent to file this brief and each has given written consent to the filing of this brief. Such written consent has been filed with the Clerk.

The MLA takes no position on the correctness or incorrectness of the opinion of which Petitioner seeks review. The MLA submits this brief merely to delineate the issues that it believes require this Court's decision and to argue in favor of review.

[2] The MLA has sponsored a wide range of maritime legislation and revisions thereto in its 108 years of existence,

described the MLA as "an organization of experts in admiralty law" and "an expert body of maritime lawyers . . . ."[3]

The purposes of the MLA[4] are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the *Comité Maritime International* and as an affiliated organiza-

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including the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315; the maritime portions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603-1611; the Maritime Lien Acts of 1910 and 1920 and their 1988 amendments, *see* 46 U.S.C. §§ 31341-31343; the Act permitting appeals from interlocutory admiralty decrees, 28 U.S.C. § 1292(a)(3); the Public Vessels Act, 46 App. U.S.C. §§ 781-790; the Extension of Admiralty Jurisdiction Act, 46 App. U.S.C. § 740; and the Inland Rules Act, 33 U.S.C. §§ 2001-2038. *See also Merchants Bank of Mobile v. Dredge* GENERAL G.L. GILLESPIE, 663 F.2d 1338, 1350, n.17 (5th Cir. 1991)(MLA "regularly participates in national and international proceedings concerning maritime treaties and conventions").

[3] *Offshore Logistics* v. *Tallentire*, 477 U.S. 207, 223-24 (1986).

[4] Admiralty courts have recognized the MLA's general interests and concerns, including the "growing risk that fundamental principles of maritime law are presently being inadvertently eroded." *Merchants Bank*, 663 F.2d at 1349, n.17.

> tion of the American Bar Association, and to act with other associations to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

It is the MLA's policy to involve itself as *amicus curiae* only when important issues of maritime law or practice are implicated and only when the effect of the Court's decision on maritime commerce or admiralty law may be substantial.[5] The MLA is interested in this case because the issue substantially affects admiralty practice and jurisdiction, and the result of the case will impact a sizeable portion of its nationwide membership.

First, denying certiorari may affect traditional admiralty jurisdiction because the characterization of a contract as maritime or nonmaritime determines whether or not it will fall within admiralty jurisdiction.[6]

Second, denying the petition for certiorari would adversely affect uniformity of maritime law and practice. There exists a split of opinion among the Circuits as to the proper test for determining whether or not a contract is a maritime contract subject to the admiralty and mar-

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[5] *E.g.*, *Exxon Shipping Co. v. Baker*, No. 07-219 (*cert granted* Oct. 29, 2007); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *United States v. Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Sisson v. Ruby*, 487 U.S. 358 (1990); *Offshore Logistics*, 477 U.S. 207; *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

[6] 28 U.S.C. § 1333; *Insurance Co. v. Dunham*, 78 U.S. (11 Wall) 1, 31-2 (1870).

itime jurisdiction of the United States courts and governed by maritime law. This Court's ruling is necessary to make the law uniform.

Third, questions of federal maritime jurisdiction by implication impact application of federal statues in the context of general maritime law.

For the foregoing reasons, the MLA's nationwide membership of attorneys, judges, law professors, and members of the maritime community have a special interest in this Court issuing a writ of certiorari to the Fifth Circuit Court of Appeal.

SUMMARY OF ARGUMENT OF *AMICUS CURIAE*

There are compelling reasons to grant Magnolia's petition for a writ of certiorari.[7] The lower court's decision involves the important issue of what type of contracts are governed by federal maritime law. The Fifth Circuit's decision below is in conflict with decisions of other United States Courts of Appeals on the same important matter.[8] The Fifth Circuit's decision does not recognize the split of authority and arguably fails to address relevant Supreme Court precedent on the issue.

The matter on which Magnolia seeks review is important[9] because it involves questions of federal jurisdiction, and by implication, construction and application of federal statutes in the context of maritime law.

[7] SUP. CT. RULE 10.

[8] SUP. CT. RULE 10(c).

[9] SUP. CT. RULE 10(a) and (c).

Lastly, the case at issue involves subject matter that should be settled by this Court.[10] Admiralty is uniquely federal[11] and national in scope.[12] Therefore, substantive as well as procedural uniformity is essential. Moreover, admiralty is predominantly judge-made law.[13] The Supreme Court therefore has a special authority and responsibility to address disputes in admiralty.[14]

ARGUMENT OF *AMICUS CURIAE*

I. PETITIONER MAGNOLIA PRESENTS AN IMPORTANT QUESTION.

The primary issue raised by Petitioner requires a determination as to when a contract is deemed "maritime" such that federal maritime law controls its interpretation. This issue arises when contracts contain both maritime and nonmaritime elements. In such cases, courts must decide if the contract will be interpreted under maritime law or some other body of law.

An important consideration in this exercise is determining whether contracts must be treated as wholly maritime or nonmaritime, or instead can be broken down into maritime and nonmaritime components so that the question of what law will govern depends of the facts of a partic-

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10 SUP. CT. RULE 10(c).

11 U.S. CONST. art. III, § 2.

12 *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874).

13 *Id.* at 576.

14 *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20-1 & n.12 (1963).

ular case rather than the nature of the contract as a whole. As discussed in Point II *infra*, the Fifth Circuit's opinion in this case creates a Circuit split regarding the proper analysis for making this determination.

The question of whether or not a contract is maritime, at least for the purposes of a given suit, is a critical and fundamental question that must be addressed in order to determine if there is a basis for federal court jurisdiction. Thus, there should be one standard test so that both practitioners and the courts can determine with reliability and uniformity whether or not a basis for federal jurisdiction exists.

II. THERE IS A SPLIT AMONG THE CIRCUIT COURTS REGARDING BOTH THE PROPER ANALYSIS FOR DETERMINATION OF WHEN A CONTRACT IS GOVERNED BY MARITIME LAW AND THE APPLICABILITY OF THIS COURT'S DECISION IN *NORFOLK SOUTHERN* TO DIFFERENT TYPES OF CONTRACTS.

In *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), this Court addressed questions of admiralty jurisdiction and governing law where the contract at issue had both maritime and nonmaritime elements. In analyzing whether a contract is to be considered maritime, the Court in *Norfolk Southern* adopted and applied a "conceptual" rather than "spatial" approach.[15]

According to *Norfolk Southern*, courts should not consider "whether a ship or a vessel was involved in the dispute" nor simply the place of

[15] 543 U.S. at 24.

formation and performance, when assessing the maritime status of a contract.[16] Rather, courts should consider, "the nature and character of the contract" and "whether it has reference to maritime service or maritime transactions."[17] Thus, in applying a conceptual approach, the Court should focus on "whether the principal objective of a contract is maritime commerce."[18]

The Court rejected a "spatial" approach, focusing solely on geography used by lower federal courts in determining the maritime nature of intercontinental multimodal transportation contracts, as inconsistent with the "conceptual" approach.[19] Applying the conceptual approach in that context, the Court stated that geography is only relevant if the sea components of the contract are insubstantial, in which case, it is not a maritime contract.[20]

The Court in *Norfolk Southern* acknowledged the importance of uniformity of maritime law stating that "[a]pplying state law to cases like this one would undermine the uniformity of general maritime law."[21] The Court further stated that "when a maritime contract may well have been made anywhere in the world, it should be

16 *Id.* at 23-24.

17 *Id.* at 24 (internal citations and quotations omitted).

18 *Id.* at 25.

19 *Id.* at 26-27.

20 *Id.* at 27.

21 *Id.* at 28.

judged by one law wherever it was made. Here, that one law is federal law."[22]

The Second Circuit case of *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413 F.3d 307 (2d Cir. 2005), was the first Circuit Court to look to *Norfolk Southern* for guidance in determining whether or not a mixed purpose contract was subject to federal maritime law.

Norfolk Southern involved an international multimodal bill of lading, while *Folksamerica* addressed the status of an insurance contract in the context of a claim for "ship-maintenance-related" personal injury sustained aboard an ocean going vessel.[23] Initially, the Second Circuit in *Folksamerica* applied a pre-*Norfolk Southern* analysis known as the "threshold inquiry" test.[24] The "threshold inquiry" test involves determination of "whether an issue related to maritime interests has been raised" and "whether the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction."[25] The Second Circuit questioned whether or not the "threshold inquiry" test survived this Court's decision in *Norfolk Southern*, but held that the case before it

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22 *Id.* at 29 (internal citations and quotations omitted).

23 *Folksamerica*, 413 F.3d at 313.

24 *Id.*

25 *Id.* at 312 (internal citations and quotations omitted).

was sufficiently distinguishable to avoid the issue in its decision.[26]

After addressing the "threshold inquiry," the Second Circuit addressed the applicability of the "incidental" exception to the general rule that mixed contracts will not be treated as maritime contracts. The "incidental" exception "allow[ed] courts to exercise admiralty jurisdiction where the non-maritime elements of a contract [were] 'merely incidental' to the maritime ones."[27] The Second Circuit found that *Norfolk Southern* had shifted the relevant inquiry from whether the nonmaritime elements were "merely incidental," to focusing on whether the "primary objective" of the contract was maritime in nature.[28] This "conceptual" or "global" approach allowed the Court to exercise admiralty jurisdiction "over a contract with nonmaritime components deemed to be *more* than 'incidental.' "[29]

The next Circuit to address the issue of whether a contract is subject to federal maritime law was the Ninth in *Sentry Select Ins. Co. v. Royal Ins. Co. of Am.*, 481 F.3d 1208 (9th Cir. 2006). Like *Folksamerica*, *Sentry* involved a determination of whether an insurance policy was a contract governed by maritime law. The Ninth Circuit took *Norfolk Southern*'s holding one step further and found that both prior exceptions to the mixed contracts rule (the "incidental" exception addressed in *Folksamerica* and another

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[26] *Id.* at 313-14.

[27] *Id.* at 314.

[28] *Id.*

[29] *Id.* at 315 (emphasis in original).

exception known as the "severability" exception, which allowed courts to apply maritime law to severable maritime portions of a mixed contract) were undercut by *Norfolk Southern*. Thus, the Ninth Circuit instead relied on *Norfolk Southern's* "conceptual" "primary objective" test.[30]

Both the Second and Ninth Circuits appear to be following the *Norfolk Southern* analysis for application of maritime law to a mixed contract regardless of the fact that *Folksamerica* and *Sentry* involved insurance contracts, while *Norfolk Southern* involved a contract of carriage. Thus, these two Circuits view *Norfolk Southern*'s maritime jurisdiction analysis as not limited to contracts of carriage.[31]

In the case now being petitioned before the Court, *Devon Louisiana Corp. v. Petra Consultants, Inc.*, 247 Fed. Appx. 539 (5th Cir. 2007), the Fifth Circuit again addresses the issue of whether a contract is subject to federal maritime law. *Devon* involved the analysis of whether a contract to repair the fixed platform (a master service agreement) of an offshore oil rig was gov-

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[30] 481 F. 3d at 1218.

[31] While *Sentry* and *Folksamerica* contain more substantive discussions of *Norfolk Southern*'s maritime contract analysis, both the First Circuit and the Seventh Circuit also cite *Norfolk Southern* with respect to the application of maritime law to contracts other than contracts of carriage. *See also The Puerto Rico Ports Authority v. Umpirre-Solares*, 456 F.3d 220 (1st Cir. 2006)(analyzing whether a contract to remove a sunken ship from navigable waters is a maritime contract); *The St. Paul Travelers Co., Inc. v. Corn Island Shipyard, Inc.*, 495 F.3d 376 (7th Cir. 2007)(analyzing whether an insurance policy is governed by maritime law).

erned by maritime law.[32] The Fifth Circuit did not cite *Norfolk Southern* and relied instead on six factors set forth in the pre-*Norfolk Southern* case of *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990):

> "(1) [W]hat does the specific work order in effect at the time of injury provide? (2) what work did the crew assigned under the work order actually do? (3) was the crew assigned to work aboard a vessel in navigable waters? (4) to what extent did the work being done relate to the mission of that vessel? (5) what was the principal work of the injured worker? and (6) what work was the injured worker actually doing at the time of injury? The maritime or non-maritime status of the contract ultimately depends on its 'nature and character,' not on its place of execution or performance."[33]

According to the Fifth Circuit, these factors "primarily address the nature and character of the contract as it was actually executed."[34] Review is warranted because the Fifth Circuit, probably one of the largest of the Circuits in terms of the volume of admiralty and maritime litigation, "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]"[35]

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32 247 Fed. Appx. at 544.

33 *Id.* at 543-44.

34 *Id.* at 545.

35 SUP. CT. RULES Rule 10(a).

The factors applied by the Fifth Circuit are in direct conflict with the application of *Norfolk Southern* in the Second and Ninth Circuits, and to some extent, the First and Seventh Circuits.[36] The analysis in *Devon* focuses on the specifics of the incident giving rise to the particular litigation at issue rather than "conceptually" looking at the nature and character of the contract as a whole, as required by *Norfolk Southern* and followed by *Folksamerica* and *Sentry*. Further, the application of the six factors by the Fifth Circuit focusing on the particulars of a given case conflicts specifically with *Sentry*'s holding that *Norfolk Southern* eradicated the "severability" exception, as it would allow courts to apply maritime law to some incidents arising out of a contract and not others arising out of the same contract. Allowing the lower courts to determine the applicability of maritime law to contracts using different standards is antithetical to the goal of uniformity in federal maritime law.

Devon did not address the *Norfolk Southern* analysis or cite the case. The Fifth Circuit may have viewed *Norfolk Southern* as inapplicable because of the difference in the types of contracts at issue. This view, however, would be in direct conflict with the view taken of *Norfolk Southern* in *Folksamerica* and *Sentry*, which both involved insurance contracts and arose from personal injuries rather than a transportation contract as in *Norfolk Southern*.

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[36] *See* n.31.

Like *Folksamerica* and *Sentry*, the underlying incident in *Devon* involved a personal injury.[37] The *Devon* court, however, did not apply the analysis used by the Second and Ninth Circuits, which created a conflict among the Circuits even though uniformity mandates that these contracts, although different types, be analyzed by the same standard so that there can be some degree of predictability and fairness in the resolution of cases involving contracts with both maritime and nonmaritime elements. This Court should accept the pending petition in order to answer the issue in dispute, *i.e.*, whether the *Norfolk Southern* analysis for determining when contracts are governed by maritime law is limited to certain types of contracts.

III. This Case Also Implicates Issues Regarding the Application of Federal Statutes in the Context of Admiralty Jurisdiction.

In addition to the need for uniformity in the determination of whether or not a contract is sufficiently maritime so as to be within the admiralty jurisdiction and governed by general maritime law, uniformity is also necessary in the application of federal statutes, regimes, or treaties to a dispute arising under a contract.[38]

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[37] *The St. Paul Travelers Co., Inc. v. Corn Island Shipyard, Inc.*, 495 F.3d 376 (7th Cir. 2007) also arose out of a personal injury.

[38] *See e.g., Altadis USA, Inc. v. Sea Star Co.*, 458 F.3d 1288 (11th Cir. 2006); *Sompo Japan Ins. Co. of Am. V. Union Pacific RR Co.*, 456 F.3d 54 (2d Cir. 2006); *Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 514 F.3d 621 (6th Cir. 2008).

For example, Circuit Courts have already developed conflicting interpretations of *Norfolk Southern* in determining what federal body of law should apply when cargo in multimodal transport is lost or damaged on land.[39] Although that particular conflict is not at issue here, it illustrates the importance of using the same standard in determining the character of a contract in order to maintain reliable application of federal statutory law, a subject on which there is also a need for national consistency.

IV. THE MATTER SHOULD BE SETTLED BY THIS COURT.

The Supreme Court has a unique authority and responsibility to resolve admiralty disputes.[40] The Constitution singles out admiralty as a matter of national importance[41] that is uniquely within the federal government's judicial purview.[42] But with only limited exceptions,

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[39] *Altadis USA, Inc. v. Sea Star Co.*, 458 F.3d 1288 (11th Cir. 2006)(maritime contract of carriage governed by COGSA, not the Carmack Amendment); *Sompo Japan Ins. Co. of Am. v. Union Pacific RR Co.*, 456 F.3d 54 (2d Cir. 2006)(similar contract of carriage applying the Carmack Amendment rather than COGSA); *Royal Ins. Co. of Am. V. Orient Overseas Container Line Ltd.*, 514 F.3d 621 (6th Cir. 2008)(maritime contract of carriage governed by COGSA, not the Hague-Visby Rules).

[40] *Fitzgerald.*, 374 U.S. at 20-1 & n.12.

[41] U.S. CONST, art. III, § 2; *The Lottawanna*, 88 U.S. at 575.

[42] U.S. CONST. art. III, § 2. While state courts may have concurrent legal jurisdiction over some cases where admiralty jurisdiction exists, 28 U.S.C. § 1331(1), they still must

Congress has left it to the courts to define the law and practice of admiralty.[43] Therefore, admiralty tribunals below as well as the nation-wide admiralty bar seek this Court's guidance, especially on such fundamental matters as the scope of jurisdiction and definition of a maritime contract, to resolve divergences among the lower courts.

Admiralty abhors nonuniformity. It is particularly important for the Supreme Court to resolve a Circuit split since such conflicts create an undesirable uncertainty for maritime actors and the proctors who advise them. Further, the Circuit split encourages forum shopping among the Circuits.[44]

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apply federal maritime law pursuant to the "reverse-*Erie* doctrine." *Offshore Logistics*, 477 U.S. at 222-23.

[43] *The Lottawanna*, 88 U.S. at 576; Fitzgerald., 374 U.S. at 20-21 & n.12.

[44] *Silver Star Enterprises, Inc. v. SARAMACCA MV*, 82 F.3d 666, 669-70 (5th Cir. 1996)("A decision by this circuit creating a circuit split and permitting the affixation of maritime liens for bulk container lessors would spawn uncertainty, compounded by forum-shopping and extravagant lien claims").

CONCLUSION

Magnolia presents an important issue. The issue involves an undesirable conflict in the federal Circuit and District Courts that can only reasonably be resolved by this Court. Therefore, the MLA, on behalf of its membership of admiralty lawyers, judges, academics, and industry actors, respectfully urges this Court to grant Magnolia's petition for writ of certiorari.

Dated: March 14, 2008

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